Supreme Court, U.S.
FILED

CASE NO. 98 1853 MAY 17 1999

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARK WEBB,

Petitioner

vs.

STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION, JOHN MILLEN, AL RAMIREZ, CECILIA MENDOZA, OLIVIA THOMAS, JUDY ROBERTSON, OSIE THORNTON, JR., NANCY BERRY, and JOEL LANDIS,

Respondents

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: STATE SUPREME COURT AND COURT OF APPEAL VIOLATED DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW BY NOT ACCEPTING AS TRUE ALL FACTS ALLEGED AND INFERRED AS TO WEBB'S DISABILITY DISCRIMINATION CLAIM.

ISSUE NO. 2: STATE SUPREME COURT AND COURT OF APPEAL ERRED IN DETERMINING THAT WEBB COULD NOT STATE A RETALIATION CAUSE OF ACTION WHEN THE COURT DETERMINED HE WAS NOT DISABLED. (THE DETERMINATION OF THE STATE SUPREME COURT AND APPELLATE COURT IS IN CONFLICT WITH THE RESULTS REACHED IN PUBLISHED OPINIONS OF STATE AND FEDERAL APPELLATE DECISIONS.)

ISSUE NO. 3: THE STATE SUPREME COURT AND COURT OF APPEAL VIOLATED DUE PROCESS OF LAW, EQUAL PROTECTION UNDER THE LAW, AMERICANS WITH DISABILITIES ACT, AND INTERFERED WITH A DISABLED PERSON'S RIGHT TO EQUAL ACCESS TO COURT AND RIGHT TO SEEK REDRESS OF HIS CLAIMS,

BY AFFIRMING THE LOWER COURT'S REQUIREMENT THAT THE COMPLAINT BE VERIFIED. (OTHER THAN SUBSCRIPTION RULES, NO FEDERAL OR STATE DECISION REQUIRES A DISABILITY DISCRIMINATION COMPLAINT BE VERIFIED.) (THIS ISSUE REQUIRES SETTLEMENT OF AN IMPORTANT QUESTION OF LAW).

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The Petitioner, MARK WEBB, prays that a Writ of Certiorari be issued to review the Order dismissing the action of MARK WEBB, and the decision of the Court of Appeal of the State of California, Second Appellate District, affirming the decision of the lower court and the decision of California Supreme Court denying a Petition for Review on February 17, 1999.

OPINIONS BELOW

The California Supreme Court's decision denying the Petition for Review on February 17, 1999 is printed in Appendix "A-3" hereto, infra. The decision of the Court of Appeal for the State of California, Second Appellate District, filed on November 24, 1998 is

printed in Appendix "A-2". The order of dismissal signed by the Superior Court on January 2, 1996 is printed in Appendix "A-1".

BASIS FOR JURISDICTION

The California Supreme Court denied WEBB'S Petition for Review on February 17, 1999. This Petition for Writ Certiorari was filed within 90 days of the decision of the California Supreme Court's denial of Petition for Review. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

STATUTES INVOLVED

Government Code, Section 12940.

Violation of the Due Process and Equal Protection clauses of the United States Constitution, made applicable to the

States pursuant to the Fourteenth Amendment and the Americans with Disabilities Act. (42 U.S.C. §12102 et seq.)

STATEMENT OF CASE

MARK WEBB filed his Complaint on June 9, 1994, alleging nine (9) causes of action: 1) Wrongful Transfer; 2) Breach of Covenant of Good Faith and Fair Dealing; 3) Intentional Infliction of Emotional Distress; 4) Negligent Infliction of Emotional Distress; 5) Breach of Oral Contract; 6) Misrepresentation; 7) Defamation - Libel; 8) Invasion of Privacy - False Light; and 9) Disability Discrimination. At all times, WEBB was an employee of the STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION, hereinafter referred to as "DEPARTMENT". At the centerpiece of the litigation was the claim that he was discriminated against on the basis of a disability, whereby he filed a Charge of

Discrimination on or about June 10, 1993 with the Department of Fair Employment and Housing (DFEH). The Court sustained a demurrer with twenty (20) days leave to amend.

In compliance with the directive of the Court, on November 7, 1994, WEBB filed a First Amended Complaint (FAC) adding three new Defendants to the action: AL RAMIREZ ("RAMIREZ"), OLIVIA RAMIREZ ("RAMIREZ", later corrected to OLIVIA THOMAS) and OSIE THORNTON, JR. ("THORNTON"). The FAC added new allegations and two new causes of action found at the Ninth Cause of action (Retaliation) and the Tenth Cause of Action (Injunctive Relief). The Sixth cause of action (Misrepresentation) had been dropped from the complaint.

On January 20, 1995, the Court sustained the demurrer with leave to amend as to the Eighth (Disability discrimination), Ninth and Tenth Causes of Action and sustained the demurrer

without leave to amend as to the First through Seventh Causes of Action. It should be noted that the Court required a most unusual condition upon leave to amend that WEBB must verify his complaint relying on language from *Government Code, Section 12960* which pertains to filing verified administrative charges with the FEHC, not to pleadings filed in legal actions.

WEBB filed a Second Amended Complaint (SAC) alleging three (3) causes of action: 1) Disability Discrimination; 2) Retaliation; and 3) Injunctive Relief.

On June 1, 1995, a demurrer to the SAC came on for hearing. The court expressed that the SAC did not specify a disability that comes under the ambit of *Government Code, Section 12926* and stated that WEBB was granted leave to amend and the pleadings must also be verified.

On June 20, 1995, WEBB filed a

Third Amended Complaint for Damages (TAC) alleging three (3) causes of action: 1) Disability Discrimination; 2) Retaliation; and 3) Injunctive Relief. Both the Second and Third Amended Complaint were verified by WEBB as ordered by the court.

On December 15, 1995, the Court sustained Respondents' demurrer without leave to amend after hearing from WEBB'S counsel that at all times WEBB had admitted there was a disability, which was grossly exaggerated by the Respondents, who claimed that WEBB was schizophrenic, when he was only suffering from clinical depression. Respondents' employees were apprised of such mental problems, and thereafter, supervisors and employees did not want to work with WEBB. He thereafter suffered retaliation, which was alleged in the amended pleadings.

On January 2, 1996, the Court signed an Order of Dismissal with

prejudice as to the entire Complaint based upon sustaining the demurrer to the TAC without leave to amend and granting the motion to dismiss pursuant to *Code of Civil Procedure, Section 581(f)(1).* On January 10, 1996, Respondents served a notice of entry of dismissal upon WEBB. On March 1, 1996, WEBB filed a timely notice of appeal .

STATEMENT OF FACTS

MARK WEBB commenced employment with the DEPARTMENT on or about January 4, 1979. His employment was governed by statutes and regulations similar to other public employees. WEBB was initially hired on January 4, 1979 as an Employment Program Representative. He later was promoted to the position of Rehabilitation Counselor Trainee on August 30, 1985 and held that position until he became a Rehabilitation Counselor on September 1, 1986. On October 3, 1990, he became a Teacher

with the Department of Corrections. On March 18, 1991, WEBB took disability for mental depression, clinical depression, until October 30, 1991, and asked to be released from the Department of Corrections teaching job because of numerous death threats to himself and his family. On or about July 8, 1991, Dr. Spindell, a psychotherapist, reported that WEBB exhibited signs of clinical depression. Dr. Spindell found clinical items of anxiety, depression and somatic symptoms. As a result of such clinical depression, he had a disability which was protected under *Government Code, Section 12926(i)* as emotional and mental illness.

On or about October 30, 1991, WEBB was placed with the DEPARTMENT OF REHABILITATION. On or about March 26, 1993, JOHN MILLEN and ALBERTO RAMIREZ informed WEBB that he would be involuntarily transferred from the Glendale office to an office in Van Nuys

effective April 1, 1993 and was informed by MILLEN that all the women in the Glendale office were afraid to work with him. RAMIREZ informed WEBB that he was incapable of handling the rehabilitation case load and working with clients due to his disability. The transfer from the Glendale offices to the Van Nuys offices and removal from several job duties he held in his position negatively impacted WEBB solely because of his disability. (Paragraph 8 of TAC).

While working for the DEPARTMENT, on or about March 10, 1993, WEBB came upon the portrait of his daughter's face, disfigured with markings placed on her forehead, that was sitting on his desk. WEBB filed a police report with the State police and the City of Glendale (¶ 9 TAC). On or about March 17, 1993, ALBERTO RAMIREZ asked WEBB if he in fact defaced his daughter's picture, stating to WEBB "because of

your diagnosed mental disability." Later, RAMIREZ asked WEBB if he was planning on bringing a weapon to the office (¶ 10 of TAC).

On or about March 26, 1993, WEBB was informed that all his rehabilitation cases were being removed from his supervision and that he would no longer be handling cases in the DEPARTMENT OF REHABILITATION. As a result, WEBB was forced to work in the Van Nuys office and only answered the telephone (¶ 11 of TAC). Later he was informed by RAMIREZ that he should not be allowed to work with clients given his mental disability. RAMIREZ made these remarks in the presence of MILLEN (¶ 12 of TAC).

In the TAC, WEBB alleged that once his mental disability was disclosed to co-workers, he suffered discrimination at the hands of fellow workers, including CECILIA MENDOZA, JUDY ROBERTSON and OLIVIA THOMAS. He alleged that ROBERTSON at one time sabotaged WEBB'S

case files on clients, Terry Rodi and Roxie Moon, for up to 2 months (¶ 13 of TAC).

On June 10, 1993, WEBB filed a Charge of Discrimination with the DFEH, claiming that on April 1, 1993 he was involuntarily transferred from the Glendale office to the Van Nuys office and had been informed by Respondent MILLEN that all the women at the Glendale office were afraid to work with WEBB and that he was incapable of handling a rehabilitation case load due to his disability. On June 10, 1993, WEBB was sent from the DFEH a Notice of Right to Sue letter.

After filing a Charge of Discrimination on June 10, 1993, WEBB alleged that he was subjected to retaliation. Retaliation included being denied on September 6, 1994 for a Senior Vocational Rehabilitation Counselor position at the DEPARTMENT'S offices in Los Angeles when Respondent THORNTON

notified WEBB that he was not selected for the position. WEBB alleged that he was the most qualified person for the position with more longevity of service than the successful applicant.

He also alleged that he suffered other forms of harassment such as, on-the-job harassment, poor performance evaluations, not given his usual, customary duties, assigned menial tasks, and other forms of adverse employment actions (¶ 34 of TAC). He claimed other aspects of retaliation occurred: (a) deleting WEBB'S case record notes requesting medical records; (b) barring WEBB from making written requests for consumer college grade transcripts in order to have consumers vocationally tested; (c) blocking WEBB from post-review; (d) accusing WEBB of insubordination when WEBB requested certain consumers be specifically evaluated; (e) refusing WEBB'S request to watch training tapes during work

schedule; and (f) being by-passed and refused contact for WEBB to interview for various Senior Vocational Rehabilitation Counselor positions that were open. Lastly, WEBB received the lowest possible score on an interview for a Community Resource Development Specialist position (¶ 34 of TAC).

Further evidence of retaliation included: Respondents endeavored to have a psychological evaluation conducted on WEBB to ascertain if he was to able to perform his job duties with the aim to terminate him (¶ 35 of TAC), and being denied appointment to another Senior Vocational Rehabilitation Counselor position by Respondent BERRY.

REASONS FOR GRANTING WRIT

POINT NO. 1

STATE SUPREME COURT AND COURT OF APPEAL VIOLATED DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW BY NOT ACCEPTING AS TRUE ALL FACTS ALLEGED AND INFERRED

AS TO WEBB'S DISABILITY DISCRIMINATION CLAIM.

A demurrer tests the sufficiency of a complaint as a matter of law. Buford v. State of California (1980), 104 C.A.3d 811, 818. The allegations of fact contained in the complaint must be normally accepted as true. Strange v. Cabrol (1984), 37 C.3d 720, 722. Noguera v. North Monterey County Unified School District (1980), 106 C.A.3d 64. 66.

The reviewing court must accept as true not only all facts alleged in the complaint, but also facts that may be implied or inferred from those expressly alleged. Estate of Lund (1989), 209 C.A.3d 1424, 1430.

It is the statutory directive, the legislative intent and public policy of the State of California that employers may not discriminate in hiring, selection for training programs, firing, compensation, or in terms, conditions,

or privileges of employment. *Government Code, Section 12940(a), 12941(a)*. Employers may not harass a person based on membership in a protected classification (*Government Code, Section 12940(h), (i)*) and may not retaliate against anyone for opposing a discriminatory employment practice or otherwise participating in *FEHA* proceedings (*Government Code, Section 12940(f)*). The *FEHA* also covers the State of California, its subdivisions, cities and counties, local agencies and special districts. *Government Code, Section 12926(d)*; *2 CCR, Section 7286.5(a)(4)*.

Clinical depression and/or schizophrenia is not excluded from the federal definition of "disability". Legislation enacted in 1992, effective on January 1, 1993, prohibits employment discrimination on the basis of mental disability. WEBB's clinical depression was disabling and covered under the

FEHA. It has been held that disabling mental or emotional impairments are protected under the *Americans with Disabilities Act of 1990 (ADA)*.

It was held that a psychiatric worker terminated because of depressive neurosis was a "handicapped" individual under the *Rehabilitation Act*. See Doe v. Regent 13 Mental Health - Mental Retardation Commission (5th Cir., 1983), 704 F.2d 1402, 1404-1408. In another case, a civil engineer denied transfer to another assignment because of manic/depressive disorder was a "handicapped" person under the *Rehabilitation Act*. Gardner v. Morris, 752 F.2d 1271. A borderline personality disorder is also covered under the *ADA* and correspondingly under *FEHA*. Doe v. New York University (2nd Cir., 1981), 666 F.2d 761, (medical student denied readmission because of a personality disorder was a "handicapped" person under the *Rehabilitation Act*). In

another case, the court ruled that a disorder that caused belligerence and failure to follow instructions was sufficient for coverage under the *Rehabilitation Act*. Schmidt v. Belle (1983), 33 FEP 839, 845-846. It was also determined that a disorder which involved chronic absenteeism was also covered under the *Rehabilitation Act*. Boyd v. United States Postal Service, 32 FEP 1217, 1221. Even the mischaracterization by Respondents of WEBB's condition as schizophrenic was covered as a disabling mental illness. Doe v. Colautti (3rd Cir., 1979), 592 F.2d 704.

Reicheart v. General Insurance Co. (1968), 68 C.2d 822, 836. It is an abuse of discretion to sustain without leave to amend a demurrer where the complaint is not fundamentally deficient in alleging facts showing a right to some relief which can be properly given. Washer v. Bank of America 21 C.2d 822.

The State Supreme Court and court of appeal affirmed the lower court's requirement that WEBB verify his pleading, then used it as an admission against WEBB, thereby violating due process and equal protection.

POINT NO. 2

STATE SUPREME COURT AND COURT OF APPEAL ERRED IN DETERMINING WEBB COULD NOT STATE A RETALIATION CAUSE OF ACTION WHEN THE COURT DETERMINED HE WAS NOT DISABLED.

The State Supreme Court and Court of Appeal rendered their decisions ruling that since WEBB did not have a disability, he no longer was a member of a protected class on his retaliation claim. Unfortunately, that ruling does not follow the huge body of federal and state appellate decisions that have made retaliation a separate protected classification. Thus, the present opinion is diametrically opposed to the results reached in published decisions

of the other federal and state appellate courts; those published decisions have long held employees who are retaliated against for making discrimination claims are a separate protected class of individuals. Is it the decision of the State Supreme Court and Court of Appeal to overrule all those decisions supporting an independent retaliation claim existing separately from a discrimination claim, both at the federal and state level, or is the State Supreme Court and Court of Appeal failing to follow the doctrine of stare decisis by ignoring those many case decisions.

The ADA and FEHA has long protected persons who filed charges of discrimination or protested workplace harassment from consequent retaliation. FEHA prohibits harassment of employees based upon any protected classification. *Government Code §12940 (e), (h), and (i)*.

Harassment and retaliation include verbal, physical and visual forms of harassment. It is not necessary that WEBB sustain a loss of tangible benefits in order to establish his claim of unlawful harassment. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 64-67.

WEBB established a prima facie case of retaliation. He filed a charge of discrimination on June 10, 1993 with the DFEH. ¶ 15 of the TAC highlights the adverse employment actions: "Defendants MILLEN and RAMIREZ involuntarily transferred Plaintiff...", "RAMIREZ and MILLEN stated that Plaintiff should not work with clients given his disability...", "Defendant CECELIA MENDOZA, JUDY ROBERTSON and OLIVIA THOMAS specifically complained they did not want to work with Plaintiff because of his mental and emotional disability...", "Defendant MENDOZA and ROBERTSON refused to receive messages so

that Plaintiff could return telephone calls...", "Defendant ROBERTSON sabotaged Plaintiff's case files...", " Defendant OSIE THORNTON selected less qualified individuals to fill the senior rehabilitation vocational counselor position." In ¶ 34 of the TAC, WEBB also claimed that he suffered on-the-job harassment, poor performance evaluations, not given his usual customary duties, assigned menial tasks and denied promotional opportunities. In specific detail in ¶ 34, WEBB alleged that his case record notes requesting medical records were deleted, and that he was barred from making written request for consumer college grade transcripts in order to have consumers vocationally tested. He also alleged that he was blocked from post review and accused of insubordination.

He further alleged that there was a causal connection between the protected activity and the adverse employment

action he experienced. He further alleges that he was refused the opportunity to watch training tapes during work schedule and being by-passed and not contacted for interview for various senior vocational rehabilitation counselor positions. He also received the lowest possible score on an oral interview for a community resource development specialist position. On October 7, 1994, WEBB filed a charge of discrimination based on retaliation.

A retaliation case is shown when: 1) plaintiff engaged in protected activity, such as filing a charge of discrimination with the DFEH; 2) plaintiff was thereafter subjected to adverse employment action by his employer; and 3) there was a causal link between the two. Fisher v. San Pedro Peninsula Hospital (1989), 214 C.A. 3d 590, 614.

There has been an ample showing of a casual link between the adverse

employment action and the protected activity for purposes of a demurrer. Miller v. Fairchild Industries, Inc. (9th Cir. 1986), 797 F. 2d 727, 731. The casual link may be inferred from circumstantial evidence by showing that other employees did not suffer the same consequences or there is a proximity of time between the employer's knowledge of the protected activities and the alleged retaliatory adverse employment action. Flait v. North American Watch Corp. (1992), 3 C.A. 467, 478.

The reviewing and lower courts' decisions are devoid of any statement that would substantiate the courts' reasoning in sustaining the demurrer as to the retaliation cause of action. When dealing with issues of discriminatory animus and retaliation, even summary judgment may be an inappropriate tool for resolving claims since there are nebulous questions of motivation and intent. Thornbrough v.

Columbus and G.R. Co. (1985, 5th Cir.), 760 F.2d 633. See also Brudne v. Amalgamated Trust and Savings Bank (1986), 627 F.Supp. 458. See also Heath v. John Morrell and Co. (1985, 8th Cir.), 768 F. 2d 245.

There was no clear basis for the court to have sustained the demurrer as to retaliation cause. It was therefore violation of due process of law and equal protection of law to sustain it when it was a factual question.

As stated above, the state courts look to federal case decisions for guidance in determining FEHA violations. Breitman v. May Co. California (9th Cir., 1994), 37 F.3d 562, 565; Stephens v. Coldwell Banker Commercial Group, Inc., 199 C.A.3d 1394; Carr v. Barnabey's Hotel Corp. 23 C.A.4th 14,18.

The Ninth Circuit in Ortez v. Washington County, State of Oregon (1996, 9th Cir.), 88 F.3d 804, 809, found error in dismissing a retaliation

cause of action when there were allegations that the employee had engaged in protected activities of which his supervisors were aware of shortly before they took adverse employment actions and he alleged that those actions were retaliatory. The Ninth Circuit reversed the dismissal order and remanded for further proceedings.

The decisions of the State Supreme and Appellate Courts create a new theory to the entire body of employment discrimination law, to wit, if one is not discriminated against, his retaliation cause of action is meritless. There are numerous cases that support the principle of law that if one reasonably believes he was discriminated and thereafter suffers retaliation and files a charge of discrimination or lawsuit based on retaliation, he is not only protected from the underlying discrimination charge, but the retaliation charge as

well. Skillsky v. Lucky Stores, Inc. (9th Cir. 1990), 893 F.2d 1088. Garcia v. Rockwell Int.'l (1986), 187 C.A.3d 467, 477. See *Labor Code Section 1102.5*. There are many cases that have gone to jury trial on just the retaliation portion of the case after the discrimination claim had been dismissed.

In the WEBB case, WEBB filed a Charge of Discrimination on June 10, 1993 with the DFEH. (APP. 274). He was within a protected class. Kauffman v. Sidereal Corp. (9th Cir. 1982), 695 F.2d 343. Richardson v. Restaurant Marketing Assoc. 527 F. Supp. 690. He reasonably believed he had been the subject of discriminatory conduct. Gifford v. Santa Fe Railway (9th Cir. 1978), 685 F.2d 1149. Sias v. City Demonstration Agency (9th Cir. 1978), 588 F.2d 692.

What constitutes an adverse employment action is broad and expansive. The employer's prohibited

retaliatory action can take myriad forms, the most obvious of these being the same kinds of actions that would render the employer culpable under Title VII for discrimination generally, such as the refusal to hire, or rehire, a delay in reinstatement, a disadvantageous transfer (Collins v. Illinois, 830 F.2d 692, St. John v. Employment Development Department (9th Cir. 1981), 642 F.2d 273), the removal from a position, a demotion, refusal to promote, refusal to transfer, or to give a deserved pay raise, suspension, discharge, or constructive discharge. Manipulation of such other employment conditions to constitute harassment or to tolerate harassment by fellow employees has likewise been perceived as retaliatory. Such harassment may take the form of interrogation, reprimands, deprivation of some of the normal benefits or rights of the position, such as overtime, vacations, in-house dispute

resolution procedures, office privileges, and access to clients (Commonwealth v. Thorp, Reed & Armstrong 361 A.2d 497, 16 FEP 1352.)

POINT NO. 3:

THE STATE SUPREME COURT AND COURT OF APPEAL VIOLATED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND AMERICANS WITH DISABILITIES ACT IN AFFIRMING THE LOWER COURT'S REQUIREMENT THAT THE COMPLAINT BE VERIFIED. SUCH VERIFICATION OF THE PLEADING IS NOT REQUIRED BY OTHER LITIGANTS OR NON-DISABLED PLAINTIFFS. The Lower court ordered on two separate occasions that WEBB verify his SAC, on January 20, 1995, and the TAC, on June 1, 1995. There is no rule of law that empowers the court to order a party to verify his complaint. The directives of *Government Code, Section 12960* only applied to the administrative charge of discrimination filed with the DFEH. There is no rule of

law that empowers the court to order a party to verify his complaint. The directives of *Government Code §12960* only apply to administrative charges of discrimination, not to a legal action. Such a requirement implies certain judicial bias resulting in interference with a disabled person's constitutional right to seek redress and have access to courts with the same parity as non-disabled persons, tantamount to a violation of equal protection clause. It was clearly erroneous to require WEBB to verify his pleading. Verification is not necessary, except where expressly required by statute. Parke & Lacy Co. v. Internos Oil & Dev. Co. (1905), 147 C. 490, 493. The trend is away from the barren formality of oath to pleadings. 5A Federal Practice and Procedure (Wright & Miller) Section 1335 et seq. It was not required by statute that WEBB verify his complaint. It was erroneous and prejudicial to require his

verification. Without giving any weight to the verified pleadings over unverified, the Appellate Court construed an admission that WEBB was not disabled; an admission that it could not draw without the illegal requirement.

CONCLUSION

WHEREFORE, for the reasons herein advanced, and on the authorities cited, WEBB respectfully urges that this case be certified for hearing and that this court reverse the decision of the California Supreme Court and Court of Appeal and the order of the Superior Court order dismissing action and remand this case to the lower court for further proceedings, including the trial of the cause.

DATED: May 13,1999



DALE M. FIOLA
Attorney for
Petitioner
MARK WEBB

APPENDIX - A-1

ORDER OF THE SUPERIOR COURT

MARK WEBB,	] CASE NO BC 106570
Plaintiff,	] ORDER OF DISMISSAL
vs.	]
STATE OF CALIFORNIA,	]
Defendants.	]

The demurrer and motion to dismiss of Defendants to Plaintiff=s Third Amended Complaint (Complaint) came on regularly for hearing on December 15, 19995 in Department 23 of the above-entitled court, before the Honorable Ronald E. Cappai, Judge, presiding, and Daniel E. Lungren, Attorney General, by

Leonard Pape, Deputy Attorney General, appeared for Defendants, and Dale M. Fiola appeared for Plaintiff.

After having considered all the documents presented and having considered the argument presented at the hearing, and having sustained Defendants demurrer to the entire Third Amended Complaint of Plaintiff without leave to amend, and having granted the motion to dismiss thereon pursuant to *Code of Civil Procedure Section 581(f)(1)*.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Third Amended Complaint of Plaintiff Mark Webb is dismissed with prejudice as to Defendants and each of them, and Defendants shall have judgment against said named Plaintiff and

Defendants shall recover costs against Plaintiff as allowed by law.

DATED: January 2, 1996

_____

Hon. Ronald E. Cappai

APPENDIX - A-2

ORDER OF COURT OF APPEAL

CASE NO. BC 106570

MARK WEBB

Plaintiff/Appellant

vs.

STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION, et al.

Defendants and Respondents.

APPEAL from an order of the Superior Court of Los Angeles County. Ronald E. Cappai, Judge. Affirmed.

Dale M. Fiola for Plaintiff and Appellant.

Daniel E. Lungren, Attorney

General, Margaret A. Rodda, Senior Assistant Attorney General, Richard J. Rojo, Supervising Deputy Attorney General, and Leonard Pape, Deputy Attorney General, for Defendants and Respondents.

Plaintiff appeals from an order of dismissal entered after Defendants demurrer to the Third Amended Complaint (TAC) was sustained without leave to amend. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Factual Background

Appellant Mark Webb commenced employment with respondent State of California, Department of Rehabilitation (ADepartment@) on January 4, 1979, as an employment program representative.

After promotions, on October 3, 1990, appellant became a teacher with Department of Corrections.

From March 18 to October 30, 1991, Appellant took disability leave for mental depression. Appellant asked to be relieved from the Department of Corrections job because of numerous death threats to himself and his family.

On about July 8, 1991, Dr. Spindell, a psychotherapist, reported Appellant exhibited signs of clinical depression (anxiety, depression and somatic symptoms). Appellant alleged clinical depression is a protected emotional and mental disability.[1]

[1] The prior complaints did not allege what the nature of Appellant=s mental disability was.

On about October 30, 1991, Appellant was placed with the Department. On about March 26, 1993, Respondents John Millen and Alberto Ramirez informed Appellant that effective April 1, 1993, he was going to be involuntarily transferred from the Glendale office to the Van Nuys office. Millen also informed Appellant and that he was incapable of handling the case load or working with clients due to his disability.

On about March 10, 1993, Appellant came upon the portrait of his daughter's face which had been disfigured. The portrait was on Appellant's desk. Appellant filed police reports with the state and the City of Glendale.

On about March 17, Ramirez asked

Appellant if he had in fact defaced his daughter's picture [b]ecause of your diagnosed mental disability. Later, Ramirez asked Appellant if he was planning on bringing a weapon into the office. On about March 26, Appellant was informed that all his rehabilitation cases were being removed from his supervision and that he would no longer be handling cases. Since that date, Appellant only answered the telephone. Later, Ramirez informed Appellant he should not be allowed to work with clients given his metal disability. Ramirez made those remarks in the presence of Millen.

Appellant alleged that once his mental disability was disclosed to his

co-workers, he suffered discrimination at the hands of fellow workers, including Respondents Cecilia Mendoza, Judy Robertson and Olivia Thomas (incorrectly named as Olivia Ramirez). Robertson sabotaged Appellant's files on two of his clients for two months.

A promotional readiness examination report, dated April 22, 1993, remarked Appellant showed poor judgment by taking client to San Diego for job interview on a weekend and stayed over night. In actuality, Appellant took his wife and child to San Diego and stayed with them, not the client.

Appellant alleged Mendoza and Robertson refused to receive messages so that he could return telephone calls and

perform other job assignments. Respondent Osie Thornton, selected less qualified individuals to fill the senior vocational counselor position that Appellant had applied for and was the most qualified to fill. Mendoza, Robertson and Thomas complained they did not want to work with Appellant because of his mental and emotional disability.

Appellant alleged that the disclosure of his mental disability caused discrimination to occur and created a hostile work environment and that he suffered from repeated acts of disparate treatment.

On June 10, 1993, Appellant filed a charge of discrimination with the Department of Fair Employment and

Housing (FEHA), based on his involuntary transfer to the Van Nuys office and Millen's statements the women were afraid to work with him and Appellant was incapable of handling his case load due to his disability.

Appellant alleged he was subject to retaliation, including being denied on September 6, 1994, a senior vocational rehabilitation counselor position in the Los Angeles office, because he had filed a charge of discrimination. Thornton notified Appellant he had not been selected for the position. Appellant claimed he was the most qualified person for the position and that Thornton and Respondent Nancy Berry had the authority to and did make the selection decision.

On October 7, 1994, Appellant filed a charge of discrimination against Thornton based upon retaliation for being denied the promotion.

Appellant alleged other forms of retaliation such as on-the-job harassment, poor performance evaluations, not being given his usual, customary duties, being assigned menial tasks, and other forms of adverse employment actions. Appellant claimed retaliation in the form of: (1) deleting his case record notes requesting medical records; (2) barring him from making written requests for consumer college transcripts in order to have consumers vocationally tested; (3) blocking him from post review; (4) accusing him of

insubordination when he requested certain consumers be specifically evaluated; (5) refusing his request to watch training tapes during work schedule; and (6) being bypassed and not contacted to interview for various senior counselor positions that were open; and (7) receiving the lowest possible score on an interview for a specialist position.

Other alleged retaliation included Respondents endeavoring to have a psychological evaluation conducted on Appellant to ascertain if he was able to perform his job duties with the aim to terminate him and being denied another senior counselor position by Berry.

On November 25, 1994, Appellant

filed a charge of discrimination against Berry for denial of the senior counselor position.

On December 16, Respondent Joel Landis backed into Appellant's car, and on February 9, 1995, Landis made derogatory remarks about Appellant Abeing a lousy Christian and an extortionist. As a result, Appellant filed an amended charge of discrimination against Landis for the disparaging remarks.

II. Procedural History

On June 9, 1994, Appellant filed a complaint alleging nine causes of action. Demurrers were sustained to subsequent amended complaints, which added additional Defendants and

additional causes of action. The TAC, the operative complaint, alleged three causes of action for disability discrimination, retaliation and injunctive relief. The opening paragraph of the TAC alleged: This is a Complaint by an employee against the employer for damages arising out of the wrongful transfer of employment. Plaintiff seeks compensatory and punitive damages. The TAC and the second amended complaint (SAC)were verified in accordance with a court order.

In Respondents demurrer to the TAC, they argued Appellant had admitted he was not disabled and thus could not avail himself of remedies for

discrimination based upon mental disability and that the individual Respondents conduct was privileged and immune from suit under *Code of Civil Procedure Section 47, subdivisions (a), (b) and (c)* and *Government Code Section 820.2*. The court sustained the demurrer without leave to amend. Subsequently, the court signed an order of dismissal.

Appellant filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. We treat the demurrer as admitting all material facts properly pleaded, but not

contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed. Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. The burden of proving such reasonable possibility

is squarely on the Plaintiff. (Citations omitted.) (Blank v. Kirwan (1985) 39 Cal. 3d 311, 318.)

II. Prior Allegations

In his previous complaints, Appellant made various allegations focusing on charge that Respondents made false statements that he had a mental disability as hereafter set forth:

1. Original Complaint: The emotional distress cause of action alleged that Respondents made wrongful accusations against Plaintiff that her was mentally unstable and that the accusations were unfounded. The cause of action for invasion of privacy alleged it was false that Appellant was mentally imbalanced.

2. First Amended Complaint (FAC):

It was a wrongful accusation that he was mentally unstable and the accusation was unfounded; there were false statement which incorrectly portrayed Appellant as mentally unbalanced; those libelous statements referred to an alleged mental disability of Plaintiff; and those statements were made with knowledge of its falsity. Those allegations were in the emotional distress and invasion of privacy causes of action.[2]

[3] The invasion of privacy cause of action in the complaint and the FAC was predicated on statements in an April 22, 1993, promotional readiness examination report. The report, which was attached to all the complaints, was missing page 2, which presumably contained the alleged statements. Appellant did not allege the report exaggerated his disability nor quote what the actual statements were.

The discrimination cause of action alleged: Defendants claimed that Plaintiff had a diagnosed mental disability and labeling it as such disclose[d] the alleged disability to others. After other employees were made aware of the alleged diagnosed mental infirmity, which Plaintiff claims was libelous and slanderous in nature and invading his right of privacy, co-workers requested that Plaintiff not work in and around them. Such conduct by Defendants created a hostile work environment for Plaintiff and was tantamount to labeling him as mentally deranged. Based upon the mislabeling by Defendants of the severity of Plaintiff's disability, Plaintiff was subjected to repeated acts of disparate treatment.

3. Verified SAC: The same paragraph quoted above was alleged in the discrimination cause of action.[3]

[3] Appellant suggests it was error for the court to order him to verify the SAC and the TAC. Appellant offers no authority in support of tha position. Even assuming arguendo it was error for the court to order a complaint to be verified, Appellant does not claim the alleged error for was reversible nor does he explain how he harmed because he had to verify the complaints. (See 9 Witkin, Cal. Procedure (4th ed. 1997), Appeal, '408-409, pp. 459-461)

4. Verified TAC: This pleading omits the prior admissions of the falsity of Appellant's mental disability, but still makes reference to defamatory remarks made by their employers, but does so without stating what was allegedly defamatory. The pleading also omits the allegation Respondents mislabeled the severity of Appellant disability.

A) any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegations, without explanation, in a later pleading. (Wennerholm v. Stanford Univ. Sch of Med. (1942) 20 Cal. 2d 713, 716.) In such a case the original defect

infects the subsequent pleading so as to render it vulnerable to a demurrer. (Hendy v. Losse (1991) 54 Cal. 3d 723, 743.) However, a party should be allowed to correct a pleading by omitting an allegation which, it appears, was made as the result of mistake or inadvertence. (Ibid) The rule applies to unverified complaints. (Pierce v. Lyman (1991) 1 Cal. App. 4th 1093, 1109; see also Weil. Cal. Practice Guide: Civil Procedure Before Trial (Rutter 1998) '6.710).

As described in the synopsis, the TAC contains various allegations pertaining to acts of discrimination or retaliation because of Appellant's mental disability. However, by

previously alleging that Respondents made false accusations that Appellant had a mental disability, Appellant alleged he did not have a mental disability.

At oral argument, Appellant stated:

> If you will understand initially, initially we came in and claimed he had a mental disability but it was exaggerated, blown out of proportion by the dissemination of other information to other personnel, which included supervisors who then said if he has got a serious mental problems, I don't want to work with him. So it is the State who is culpable for exaggerating the scope of his mental disability. He has admitted at all times he has a mental disability. What he's claiming was libelous was the fact that had exaggerated it. If he had clinical depression, you don't say the guy is suffering from schizophrenia. You do that, you have a lot of people who say I don't want to work with this guy if he's schizophrenic. He was improperly labeled, that was the gist of this case. the court felt there was an inconsistency. He was either admitting he was disabled or not. In the second

amended complaint we admitted it was libelous for them to make statements about him that were exaggerated and grossly out of proportion with what his mental disability was.

On appeal, Appellant repeats his argument that responds misunderstood the gist of his complaint. Appellant says he always admitted he suffered from clinical depression, but Respondents improperly informed Appellant's co-workers that he suffered from schizophrenia. The difficulty is that there is no mention of schizophrenia in any of the complaints, and Appellant did not identify the nature of his mental disability as being clinically depressed until the TAC. In essence, Appellant is attempting to distinguish mental instability, mental imbalance: and

mental infirmity from clinical depression.

The FAC and SAC each contained a single allegation that: Based upon the mislabeling by Defendants of the severity of Plaintiff's disability, Plaintiff was subjected to repeated acts of disparate treatment. The FAC, which contains the invasion of privacy claim accusing Respondents of making libelous statements referring to Appellant's alleged mental disability. In the TAC, Appellant abandoned any reference to exaggerating the severity of his disability. At the hearing on the demurrer to the TAC, Appellant's counsel admitted: He was a mental infirmity.

Respondents demurred to the TAC on

the basis that in the previous complaints Appellant had admitted he was disabled. In his written response to that demurrer, Appellant did not argue this theory of exaggeration, rather he argued he did not make a fact admission in the prior pleadings, but only stated a legal conclusion. Previously, in the demurrer to the SAC, Respondents had raised this same point. Despite these warnings, Appellant did not argue the prior allegations were the result of mistake or inadvertence; rather he eliminated the pertinent allegation. The prior allegations of false accusations of mental disability; which must be read into the TAC, rendered the TAC vulnerable to demurrer.

Accordingly, the court properly treated the TAC as a sham pleading and properly sustained demurrers to the entire RAC. (Owens v. Kings Supermarket (1988) 198 Cal. App. 3d 379, 384.)

Appellant argues that even if he does have a viable cause of action for disability discrimination, the cause of action for retaliation still remain as he asserted various acts of retaliation following his filing several DFEH charges and he was a member of a protected class. As discussed above, Appellant's prior allegations constitute an admission he was not disabled such that he is not a member of a protected class so that cause of action is also not viable.

We need not address other issues raised by the parties. However, in the context of suits by employees and wrongful termination (and related causes of action) are fraught with peril for the pleader as complaints are often a cauldron of allegations and causes of action with no attempt to match the allegations with the elements of the proper cause of action.

For instance, in this case, in response to an argument that under Janken v. GM Hughes Electronics (1996) 46 Cal. App. 4th 55, 64-65, the individual Respondents were not liable for acts of discrimination in necessary personnel management actions Appellant argues under Janken and Reno v. Baird

(1988) 18 Cal. 4th 640, the individual Respondents are liable for harassment, but he never asserted a harassment cause of action in any of his complaints.

DISPOSITION

The order is affirmed. Respondents to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We concur:

APPENDIX - A-3

ORDER OF THE CALIFORNIA SUPREME COURT

MARK WEBB Plaintiff/ Appellant, vs. STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION et al. Defendant/ Appellee.	CASE NO. BC 106570

Appellant's petition for review DENIED.

Dated: February 17, 1999

CHIEF JUSTICE GEORGE

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF ORANGE

I, MONICA VALDEZ, am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is 200 North Harbor Boulevard, Suite 217, Anaheim, California 92805.

On May 14, 1999, I served the foregoing document(s) described as: **PETITION FOR WRIT OF CERTIORARI AND APPENDIX** on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

[XX] **BY MAIL** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Anaheim, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date

is more than one day after the date of deposit for mailing in affidavit.

Executed on May 14, 1999, at Anaheim, California.

[X] STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Monica Valdez

MONICA VALDEZ

ATTACHED LIST

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